**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO. 5906 OF 1996.**

Shri Kantilal Somabhai Kothari. ... Petitioner.

V/s.

1. Shri Udayvare Raghavendra Acharya,

2. Mrs.Ramdevi R. Acharya,

3. Kallianpur Madhav Pai,

4A. Mrs.Katy Feroz Dalal,

4B. Mr.Feroz Hirji Dalal,

4C. Mrs.Ellis M. Ruben. ... Respondents.

K.Y.Mandlik for the petitioner.

R.M.Nakhwa for respondent Nos.1 and 2.

**CORAM: V.C.DAGA, J.**

**DATED: 26th September, 2006.**

**JUDGMENT :**
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. This petition is directed against the judgment and order dated 6th September, 1996 in Appeal No.427/1988 in R.A.E. Suit No.133/821/1969 passed by the Division Bench of the Small Causes Court at Mumbai confirming the judgment and decree dated 6th September, 1996 passed by the Small Causes Court in suit directing eviction of the petitioner- tenant from the suit premises within a

period stipulated therein.

**Factual Matrix :**

2. The factual matrix reveals that one Mr.N.V.Baliga was the owner of the building situated at 257, Frere Road, Fort, Mumbai- 400 001. Some time in the year 1959, Mr.Baliga filed suit for eviction against his tenant, an old generation "Mugle Azam" film fame personality- Mr.Mubarak (original defendant No.1); who was occupying premises consisting of 5 rooms with his servant, cook and other paraphernalia. In the year 1965, the said suit came to be compromised pursuant to which Mr.Mubarak became statutory tenant of five rooms located on the first floor of the building on payment of monthly rent @ Rs.115/-.

3. The aforesaid tenancy of Mr.Mubarak came to be terminated by notice dated 28th September, 1968 issued under section 106 of the Transfer of Property Act, 1882. The tenant- Mr.Mubarak was called upon to quit and deliver vacant and peaceful possession of the suit premises to the owner and original landlord- Mr.Baliga.

4. Mr.Mubarak, tenant failed to quit and deliver vacant possession of the suit premises. The original plaintiff- Mr.Baliga filed civil suit

being R.A.E.Suit No.183/821 of 1969 for his eviction on various grounds amongst others subletting, causing nuisance and making alterations of permanent nature to the suit premises without consent of landlord.

5. The aforesaid house property, during the pendency of the aforesaid suit, by a registered gift deed dated 20th June, 1986 was gifted by Mr.Baliga to the present respondent- Mr.U.R.Acharya. The original plaintiff- Mr.Baliga died on 23rd October, 1986. In view of the deed of gift and subsequent death of Mr.Baliga, M/s.Acharyas came to be substituted, in place of deceased, late Mr.Baliga, as plaintiffs.

6. Mr.Mubarak, the original defendant No.1/ tenant appeared in suit and filed his written statement.

7. Mr.Mubarak was an Actor; who used to act in the films. He was a bachelor. One Mr.Somabhai Kothari, father of the present petitioner was working with him as his Cook. He was given one room to occupy as a servant. Petitioner,

subsequently, joined and started staying with his father, in the room allotted to his father.

8. The suit was for eviction of a tenant; which included eviction of his paraphernalia, viz. cook; servant; and other occupants. It appears that since father of the petitioner was servant of Mr.Mubarak, the plaintiff did not think it necessary to join him as party-defendant to the suit, however, those who were inducted as subtenants by Mr.Mubarak in the part of the premises, were impleaded as party defendants at the time of filing of suit, which is clear from para-2 of the plaint reading as under:

> "2. The plaintiff states that the original defendant No.1 has sublet and/or transferred and/or assigned his interest a portion of the suit premises to another person or persons in violation of the terms of tenancy and against the provisions of the Bombay Rent Act. The original defendant No.1 has been profiteering from such sub letting. The original defendant No.1 has thus caused nuisance to other tenants. The original defendant No.1 has also made material alterations of permanent nature in the suit premises.

9. The dispute between the tenant- Mr.Mubarak and plaintiff-landlord came to be compromised. Some of the sub-tenants, who were occupying part

of the suit premises left with Mr.Mubarak and vacated premises in their possession. However, present petitioner, who came in possession of the suit premises during pendency of the suit, after demise of his father, did not vacate part of the premises occupied by him. Consequently, he came to be impleaded as party-defendant with one more defendant as defendant Nos.2 and 3 to the suit on 9th March, 1982 with the following pleadings:

> "2A. The defendants 2 and 3 have been joined as parties in actual occupation of distinct portions of the fifth floor for the complete and effectual adjudication of the matters in issue."

10. On being summoned, petitioner appeared and filed his written statement contending that in view of the amendment to the Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947 ("Bombay Rent Act" for short); he became statutory tenant entitled to protection of section 15-A of the said Act so as to claim statutory tenancy in his own rights; and that the suit was barred by limitation against him.

11. The trial Court, vide its judgment and order dated 17th August, 1988 decreed suit for

eviction against the petitioner overruling all his objections.

12. Being aggrieved by the aforesaid judgment, order and decree, appeal bearing No.427/1988 was preferred by the petitioner before the Division Bench of the Small Causes Court, Mumbai which, ultimately, came to be dismissed vide judgment and order dated 6th September, 1996, as a result of which, the decree of eviction passed by the trial Court came to be confirmed.

13. Being aggrieved by the aforesaid order of the lower appellate Court, the petitioner has invoked writ jurisdiction of this Court under Article 227 of the Constitution of India to challenge the same.

14. Mr.Mandlik, learned counsel appearing for the petitioner and Mr.Nakhwa appearing for the respondents were heard at length.

**Submissions:**

15. Mr.Mandlik, learned counsel for the petitioner raised two main contentions, namely;

(i) that suit is barred by limitation and (ii) that petitioner was a sub-licencee and, therefore, entitled to protection under section 15A of the Bombay Rent Act. The written submissions raising these contentions were taken on record.

16. Mr.Mandlik, while elaborating his submissions, submitted that the suit against the petitioner was bared by limitation since the petitioner came to be impleaded on 9th March, 1982 in the suit filed in the year 1968. According to him, cause of action against him for the suit arose in the year 1968 since the landlord became entitled to sue for possession in 1968 itself; when subletting took place, whereas the petitioner came to be impleaded as party-defendant on 9th March, 1982. According to him, obviously, when he was added as party to the suit the suit was barred by limitation since application for his impleadment was filed after 12 years from the date of entitlement of landlord to sue for possession. That is how, Mr.Mandlik canvassed that the suit was barred by limitation.

17. In the submission of Mr.Mandlik, suit was

for possession filed on the ground of unlawful subletting. That having negatived the ground of sub-tenancy, the only order in suit could have been to dismiss the suit; but, surprisingly, the Courts below have decreed the suit. According to him, no ground under the Bombay Rent Act has been established or proved against the petitioner as such the impugned decree is erroneous and unsustainable in the eye of law.

18. Mr.Mandlik submits that the plaintiff-landlord in the plaint pleadings and evidence had stated that the petitioner was illegal subtenant. The only course open to the Courts below was to find out whether or not subtenancy was protected under the Statute, sub-tenancy being prior to 1st February, 1973. He, thus, claimed protection of section 15-A of the Bombay Rent Act. He placed reliance on two judgment of the Apex Court in the case **Ganpat Ram Sharma v. Gayatridevi**, AIR 1987 SC 2016 and **Shakuntala v. Hem Chand**, AIR 1987 SC 1823 in support of his support of his submissions.

**Per Contra :**
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19. Mr.Nakhwa, learned counsel appearing for the respondents urged that the suit is of 1969. On one occasion the matter was remanded back by the appellate Court to the trial Court for rehearing. He submits that both the Courts below on the basis of law laid down by this Court as well as the Apex Court, concurrently, held in favour of the plaintiff and granted decree for eviction of the petitioner, hence it need not be interfered with in writ jurisdiction of this Court.

20. In his submission the petitioner totally failed to prove his case of statutory subtenancy or establish that he is a protected statutory tenant under the Bombay Rent Act. He submits that the petitioner is a son of Mr.Somabhai Kothari; who was working with Mr.Mubarak (original defendant No.1) as his Cook. The petitioner being son of Mr.Somabhai Kothari (Cook) was staying with his father as his family member. The decree for eviction against Mr.Mubarak, original defendant No.1 was sufficient to evict his servant-cum-cook Mr.Somabhai Kothari. However, after his death, in order to get the complete decree; it became

necessary to join present petitioner as party-defendant to the suit. He was never described as subtenant of Mr.Mubarak. As a matter of fact, Mr.Mubarak (original defendant No.1) had disowned the petitioner. He also submits that petitioner's father's name was appearing in the ration card of Mr.Mubarak, original defendant No.1 as his servant and, therefore, after death of his father petitioner did not get any legal right muchless to claim status of statutory subtenant.

21. Mr.Nakhwa further submits that the petitioner failed to produce any rent receipts and/or receipt showing payment of any compensation either paid to defendant No.1- Mr.Mubarak or to the present plaintiff though he claimed to have such documents in his possession. He, thus, prayed that the petition being without any substance is liable to be dismissed.

22. Mr.Nakhwa, learned Counsel for the respondent relying upon judgment of the Apex Court in the case of **Puran Singh v. Sundari Bhagwandas Kripalani** 1991 AIR SCW 779, submitted that the Rent Act was amended by Maharashtra Act 17 of

1973. By the amending Act, section 5 (4A) and section 15A were introduced in the parent Act to confer on the licensee, who had a subsisting agreement on February 1, 1973, the status and protection of a tenant under the Rent Act. Section 15A required that the occupant must be in occupation of the premises as a licensee as defined in section 5(4AA) on the date of 1st February 1973. If he be such a licensee, the non-ostante clause of section 15A(1) gives him the status and protection of a tenant in spite of there being anything to the contrary in any other law or in any contract. In other words, even as against the express terms of the subsisting contract of licence, the licensee would enjoy the benefit of section 15A, but, if he was not a licensee under the subsisting agreement on 1st February 1973, then he does not get the advantage of the amending provisions of the Bombay Rent Act.

23. Mr.Nakhwa further submits that so far as question of limitation for filing suit is concerned, no such specific plea was raised either before the trial Court or before the lower appellate Court. In his submission, this question

being a mixed question of law and facts ought to have been raised before the trial Court or at least before the lower appellate Court. Since no such question was raised, the petitioner should not be allowed to raise this plea for the first time in writ petition, that too; at the stage of final hearing of the petition. He placed reliance on the judgment of the Apex Court in the case of **Jagat Ram v. Varinder Prakash** (2006) 4 SCC 482 and in the case of **Food Corporation of India v. Babulal Agrawal** (2004) SCC 712 in support of his submission.

24. Mr.Nakhwa further urged that in the case of **M.M.Amonkar v. S.A.Johari**, AIR 1984 SC 931, the Apex Court laid down that concurrent findings of fact based on evidence should not be interfered with under Article 227 of the Constitution of India. He, thus, submit s that petition is liable to be dismissed.

**Consideration:**
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25. Having heard rival parties, at the outset, it must be observed that on the date when present

petitioner was joined as party-defendant to the suit i.e. on 9th March, 1992, there was no subsisting leave and licence agreement either in favour of the petitioner or his father, the original licensee. In other words, as on 1st February, 1973, petitioner was not holding any licence or sub-licence in relation to the suit premises as such he was not entitled to get advantage of the amending provisions of the Bombay Rent Act. The sine qua non for the applicability of section 15A of the Rent Act is that a licensee must be in occupation as on 1st February, 1973 under a subsisting license.

26. A person, who has continued to be in possession of the premises after termination; withdrawal; or revocation of the licence, is to be treated as a trespasser or as a person who has no semblance of any right to continue in occupation of the premises. Such a person by no stretch of imagination could be called a licensee. The licensee in the instant case was not in possession as a licensee on 1st February, 1973, the licence having been terminated prior to that date. Therefore, in terms of sections 5(4A) and

15A of the Bombay Rent Act it is clear that the licensee was not entitled to protection of section 15A of the Bombay Rent Act.

27. It is not disputed that the licensee did not answer description since licence was in favour of Mr.Mubarak which was terminated in the year 1968. The father of the petitioner was a servant of Mr.Mubarak. The petitioner kept on holding possession of the room even after death of his father, as such he came to be joined as party-defendant to the suit, only to seek complete decree of eviction in favour of the plaintiff.

28. It is not disputed that the petitioner's father was occupying the premises as an employee of original defendant No.1- Mr.Mubarak. After the death of his father he had no right to occupy the premises bereft of the terms of employment. Since the petitioner was in possession, he was required to be joined as party-defendant. He was and is, thus, not entitled to claim statutory tenancy in his favour. Learned Counsel for the respondent rightly placed reliance on the judgment in the case of **Puran Singh** (Supra).

29. The Apex Court in the case of **F.C.I. v. Babulal Agrawal**, (2004) 2 SCC 712 has said, it is no doubt true that when suit was filed beyond limitation, it is liable to be dismissed even though limitation may not have been set up as a defence. This position is not in dispute. But, in all fairness, it is always desirable that if the defendant would like to raise such issue, he had better raised it in the pleadings so that the other party may also note the basis and the facts by reason of which the suit is sought to be dismissed as barred by time. That it is true that the Court may have to check it as to whether or not suit is within limitation. There is always an office report on the limitation at the time of filing of suit. In case, the Court does not prima facie; find it to be beyond time; at that stage, it would not be necessary to record any such finding on the point, muchless a detailed one. In such a situation, at least at the appellate stage, if not earlier, it would be desirable on the part of the defendant to raise plea regarding limitation.

30. It is quite often that the question of limitation involves question of facts as well as law which are supposed to be raised and indicated by the defendant. The objecting party is not supposed to conveniently keep quiet till the matter reaches the High Court and wake up in a non-serious manner to argue that the Court failed in its duty in not dismissing the suit as barred by limitation,. The trial Court may not find the suit to be barred by time and proceed with the case but in that event the Court would not be required to record any such finding unless any plea is raised by the defendant. Since no such question was raised before either of the Courts, in my view, no consideration thereof is warranted.

31. It is needless to mention that the original suit was filed well within limitation against original defendant No.1- Mr.Mubarak seeking his eviction from the suit premises, which was also to result in eviction of the father of the petitioner, who was serving with Mr.Mubarak-original tenant. The petitioner was staying with his father during the pendency of the suit. After the death of his father, he came in possession of

the suit premises. Therefore, it had become necessary to join him as party-defendant since this event had taken place during the pendency of the suit. Therefore, the present petitioner was rightly impleaded as party-defendant to the suit.

32. If one turns to plaint averments, the plaintiff has nowhere described the present petitioner as sub-tenant. Amendment to the plaint or his impleadment to the suit was never challenged by the present petitioner. In this view of the matter, plea of limitation can hardly be of any substance and at any rate, cannot be allowed to be raised. The said plea is thus, liable to be rejected as frivolous.

33. Since the parties were allowed to argue on the question of limitation to prima facie; demonstrate whether suit was in limitation, I deem it necessary to record my finding in this behalf.

34. As a matter of fact, if tenant is allowed to stay in the tenanted premises with his servants or relatives, then, each member staying with him need not be a party to the eviction suit. The

eviction of tenant, automatically, results in eviction of other occupants unless special rights in their favour are crated by law. It was, therefore, not necessary to join father of the petitioner (who was servant of the original tenant) as party-defendant to the suit. However, after the death of his father and Mr.Mubarak, the petitioner started intermeddling with the suit property which was in possession of Mr.Mubarak as a tenant. In this view of the matter, it became necessary to join the present petitioner as party-defendant to the suit or eviction. Needless to observe that if the family members of the servant are staying in the servant quarter attached to the tenanted tenement, then it is not necessary to file separate suit against them for eviction and possession based on title of the property. Such disgruntled legal representatives of the servant can always be impleaded in the suit for eviction filed against a tenant. Otherwise, for decades together the landlord’s right to claim eviction of tenant would be placed in jeopardy for no fault on his part. Such approach would result in putting unnecessary burden on the right of property of a person, that too, at the instance of

a person who has no semblance of right in his favour. The submissions made in this behalf by the petitioner are without any substance. By no stretch of imagination suit could be said to be barred by limitation.

35. In the case of **Dr.Anant Kumar Karmarkar v. Kanchanben Niranjan**, 1999 BCR 339, the Apex Court had occasion to consider similar situation. The Court held that in order to effectively decide all the points and controversies in the suit and to obtain the relief of possession, the plaintiff has right to amend the plaint and to join third person as a party-defendant to the suit to avoid multiplicity of the litigation. As a matter of fact, impleadment of the petitioner as party-defendant to suit was never challenged by him and, if subsequent events resulted in petitioner coming in possession of the premises during the pendency of the suit, then, certainly, it was all the more necessary for the plaintiff to join him as a party-defendant to the suit. Such impleadment, in the facts and circumstances of the case, cannot be faulted on the touchstone of law of limitation.

36. Sufficiency of evidence cannot be gone into in writ jurisdiction of this Court since this Court is not exercising appellate jurisdiction over rent Courts. This Court not being a Court of appeal, is not expected to reappreciate the evidence in view of the judgment of the Apex Court in the case of **Laxmikant Revchand Bhojwani v. Pratapsingh Mohansingh Pardeshi (1995) 6 SCC 576,** (para 9), wherein following observations were made:

> " Before parting with this judgment, we would like to say that the High Court was not justified in extending its jurisdiction under Article 227 of the Constitution of India. The Act is a special legislation governing landlord-tenant relationship and disputes. The legislature has, in its wisdom, not provided second appeal or revision to the High Court. The object is to give finality to the decision of the appellate authority. The High Court under Article 227 of the Constitution of India cannot assume unlimited prerogative to correct all species of hardship or wrong decisions. It must be restricted to cases of grave dereliction of duty and flagrant abuse of fundamental principles of law or justice, where grave injustice would be done unless the High Court interferes."

37. Bearing in mind the above observations of the Apex Court and considering the concurrent findings of fact recorded by the Courts below, it

is very difficult to reach to the conclusion that the impugned order is a perverse order. Cogent reasons are given by the lower appellate Court while confirming the findings of fact recorded by the trial Court on each and every issue raised in the appeal. The lower appellate Court appreciated oral evidence and recorded findings of fact and affirmed the findings of facts recorded by the trial Court. No case is made out either in the petition or during the course of hearing to demonstrate that any piece of evidence was not taken into account by the Courts below or that any piece of evidence was misconstrued by the lower appellate Court.

38. At this stage, learned counsel for the petitioner sought time to vacate the suit premises for approaching the Apex Court. Learned Counsel for the respondent has no objection for grant of reasonable time. The petitioner is granted eight weeks time to vacate suit premises subject to the orders of the Apex Court, if any. Time is granted subject to furnishing usual undertaking within one week from today, stating therein that in the event of unsuccess before the Apex Court the petitioner

shall quit; vacate; and hand over vacant and and peaceful possession of the entire premises to the respondent- landlords without any demure or excuse and that he shall not create any third party interest in respect of the suit premises and that he shall pay occupation charges @ Rs.4,000/- per month from two months. Undertaking shall be signed by all the members of the family and/or occupants staying with the petitioner.

39. Thus, taking overall view of the matter, no case is made out on merits. In the result, petition is dismissed. Rule is discharged, however, subject to payment of costs quantified in the sum of Rs.10,000/- to be paid with the filing of undertaking in this Court.

**(V.C.DAGA, J.)**